IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHRISTOPHER TOMPKINS and LISA TOMPKINS, husband and wife,	)	No. 63621-9-I
Respondents,	)	
v.	)	
PHILIP BITAR and MARIE BITAR, husband and wife,	)	UNPUBLISHED OPINION
Appellants.	)	FILED: April 26, 2010

Ellington, J. — Philip and Marie Bitar claim title to land owned by their neighbors, Lisa and Christopher Tompkins, on grounds of adverse possession and/or mutual recognition and acquiescence. The trial court rejected their claims and we affirm. The Bitars' use of the land did not satisfy the elements of adverse possession for the required 10 years, and the Bitars did not prove that a well defined line was mutually recognized or accepted as the true boundary. The court did not err in quieting title in Tompkins.

FACTS

The parties own adjacent residential parcels in Arlington. In or around 1990, John and Barbara Haggerty purchased 14.485 acres, where they kept horses. They

sold the property to Lisa and Christopher Tompkins in 2002.

A five acre lot now owned by the Bitars lies east of the Tompkins' property and abuts its western and southern sides. The Bitars bought the property in 1995 from Angela and Brian Adams, who had owned it since 1989.

The area in dispute lies west of the survey line between the two properties and east of a fence known as the Haggerty fence. It is a wedge of land over 330 feet long and between 19.49 and 29.35 feet wide, totaling 8,145 square feet. On the Bitar side of the disputed area lies a pond whose size varies with the seasons. Occasionally, the pond extends into the disputed area. The land around the pond slopes gently downward. On the Tompkins side, the land the area is marshy and thickly vegetated with alder, cottonwood, and blackberries. On the Bitar side, it is dry and vegetation is less abundant.

The pond has been the focus of many Bitar family activities, especially when their three children were young. From time to time, Mr. Bitar did maintenance work around the pond, including in the disputed area. He mowed approximately every other year and removed blackberries approximately every three years.

The Bitars' predecessors, the Adamses, used the property mainly as pasture for horses, for which they installed a temporary electric fence.[1] They did not obtain a survey of the property. In the western area, they placed the fence as close as possible

[1] All the electric fences referred to in this opinion consisted of two or three strands of electrified wire strung between wooden or metal posts. The Adamses considered their fence temporary because the fence posts were not cemented into the ground.

to where they thought the boundary line was, using as a reference point a post at the southwest corner of their property and the partial skeleton of an older fence. Although

they knew the true boundary line went through the pond area, the Adamses placed their fence around the pond to the west so that the horses would not get tangled in the pond and the fence would not short-circuit.

When the Haggertys arrived in 1990, Mrs. Adams acknowledged to them that the electric horse fence encroached on Haggertys' property. Haggartys allowed the Adamses to leave the fence where it was.

Haggertys also installed an electric fence for horses, which they placed on firm, higher ground around a stand of alders west of the pond. In the mid-1990s, Haggertys built a new electric fence for cattle closer to the pond. This is the fence now called the Haggerty fence. Again, there was no effort to place the fence on the property line. The Haggertys found a marker along the south line and built their fence within a foot of that marker to the west, then north toward the middle of their property. For this, they had to cut down some alders. In Mr. Haggerty's words, his approach to establishing the location of the fence was "pretty much eyeballing it."[2]

When the Bitars bought their lot, they did not obtain a survey. A real estate agent told them the western boundary was marked by a post at the southern end, which the Bitars describe as a railroad tie. The Adams fence was connected to the post.

After the Haggertys built their fence, the Bitars started dismantling the old Adams fence. They took out the last parts in 1999, and installed an underground electric fence for their dog. The underground fence was within six to ten inches of the Haggerty fence. After the Tompkinses arrived in 2002, the Bitars sent them a letter

[2] Clerk's Papers at 105.

informing

them about the "invisible" dog fence. The letter did not mention its location. The underground fence was replaced over a four to six month period in 2004 or 2005. Starting in 2002 or 2003, Mr. Tompkins cleared brush along both sides of the Haggerty fence once a year. The Bitars did not object.

The present dispute arose when Mr. Tompkins commissioned a survey of his property. The survey revealed the true boundaries. The Tompkinses sued to quiet title. The Bitars counterclaimed, asserting title by means of adverse possession and/or mutual recognition and acquiescence. Following a bench trial, the court quieted title in the Tompkinses.

The Bitars appeal.

ANALYSIS

The Bitars contend the court erred in declining to award them title. They challenge several of the court's findings and conclusions. Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings and if so, whether the findings support the conclusions of law and judgment.[3] Substantial evidence exists when there is a sufficient quantum of proof to support the findings of fact.[4] Even where the evidence conflicts, an appellate court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings.[5] Credibility determinations are for the trial court.[6]

[3] Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

[4] Org. to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996).

[5] State v. Black, 100 Wn.2d 793, 802, 676 P.2d 963 (1984).

Findings of fact and conclusions of law are examined for what they are regardless of their label.[7]

Adverse Possession

One claiming title by adverse possession must prove 10 years' possession that was (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile.[8] Because the holder of legal title is presumed to possess the property, the party claiming adverse possession bears the burden of proof on each element.[9]

Hostility requires proof that the possessor treated the property as an owner would.[10] Permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, operates to negate the element of hostility.[11] The claimant bears the burden of proving that permission terminated and that the owner had notice of the adverse use.[12] Absent revocation, only the sale of the servient estate, clear notice, or obvious change in use terminates permission.[13]

The court found that Haggertys granted Adamses permission to occupy that

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[6] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .

[7] Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

[8] ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). The 10 year period may be computed by tacking on a predecessor's adverse use if privity exists between them, and they have held continuously and adversely to the title holder. Roy v. Cunningham, 46 Wn. App. 409, 413–14, 731 P.2d 526 (1986).

[9] ITT Rayonier, 112 Wn.2d at 757.

[10] Chaplin v. Sanders, 100 Wn.2d 853, 860–61, 676 P.2d 431 (1984).

[11] Id. at 861–62.

[12] Miller v. Anderson, 91 Wn. App. 822, 832, 964 P.2d 365 (1998).

[13] Id.

portion of the disputed area which was on the east side of the Adams fence.[14] The evidence supports this finding. Mrs. Adams was asked whether she and the Haggertys had ever discussed the issue of their fence not being on the survey line, and she testified as follows:

> A. Well, we had a few discussions. . . . Nothing that was huge in nature. But the first one was that I recall that our fence was over, not exactly where the property line was.
>
> Q. Right.
>
> A. That was fine.
>
> Q. I'm not sure what you mean by that.
>
> A. Meaning on the pond, that it went around the pond instead of whatever it was supposed to be to a T.
>
> Q. Correct.
>
> A. And John and Barb thought that that was okay, not to mess with the fencing. At that point, they hadn't had any animals. They had horses. They had 16 acres, so it was way far up, and it wasn't a problem.
>
> Q. Do you know if they were aware already that the fencing encroached on their land or did you tell them that?
>
> A. I have no idea.
>
> Q. Okay. In your discussions, there was a discussion with them about whether you should move it back to the line?
>
> A. Yes, that's correct.
>
> Q. They said it was fine where it was?
>
> A. Yes.[15]

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[14] "'Whether use is adverse or permissive is a question of fact.'" Id. at 828 (quoting Miller v. Jarman, 2 Wn. App. 994, 997, 471 P.2d 704 (1970)).

[15] Report of Proceedings (RP) (Jan. 13, 2009) at 191–92.

Mrs. Adams did not use the word "permission," but that is what she described: the Haggertys allowed them to leave the fence where it was—encroaching on Haggertys' property.

The Bitars claim Ms. Adams' testimony is contradicted by that of her husband, who allegedly testified they and Haggertys had an agreement regarding the western boundary. First, the Bitars mischaracterize Mr. Adams's testimony. He explicitly stated there was no agreement as to the western boundary. The referenced agreement concerned the boundary between the two properties on the eastern portion, on the street side. In any event, it is for the trial court to resolve contradictions in the evidence.

Finally, the Bitars argue that Mr. Haggerty did not recall having any discussions about the boundary, and that an absence of such discussion is consistent with the Haggertys' request for permission for their boys to use the pond and cross the Bitar property, and their failure to protest tree cutting by the Bitars in the disputed area.[16]

But the pond is on the Bitar property, so Haggertys' request for permission to use it is irrelevant to whether Bitars had permission to use the disputed area on Haggertys' property. As to tree cutting, the evidence conflicted. The court was required to resolve the issue, and Ms. Adams's testimony supports the court's finding of permission.

The Bitars contend, however, that a change in the use of the disputed area

[16] Mr. Haggerty had no recollection of any discussion with the Adamses regarding the property line, and neither of his asking Mr. Bitar for permission to cut trees around the pond.

occurred after they bought the property and began intensive family use of the area around the pond, which terminated permission and gave Haggartys notice of their ownership

claim. This argument is unpersuasive. There is nothing in the record suggesting that Haggertys' permission to Adamses was limited to any particular use, and the alleged change in use is too slender a reed to carry the significance ascribed to it.

First, most of the property used by the Bitars in their family activities centered on the pond, which is not in the disputed area except for brief periods during the rainy season. The Bitars were a young family that could be expected to use their property for children's recreation. The fact that some of the Bitars' family activities spilled into the disputed area did not give the Haggertys notice that Bitars' use exceeded the permission they had given to Adamses to leave the fence where it was. Nor did their maintenance of the area have such effect. The Adamses' horses had kept the grass under control. The fact that the Bitars engaged in minimal maintenance of the area around the pond sent no signal of a claim of ownership. The Bitars' family activities did not terminate permission.

Not until the Bitars installed their first underground fence in 1999 did they undertake any activity that could have provided notice to the Haggertys and supported a claim of ownership. Given that the fence was invisible, even this is not a foregone conclusion.

The Bitars did not refute the Haggertys' permission until 1999 at the earliest. They did not prove hostile possession for the required 10 years.[17]

[17] The Bitars' failure to prove hostility renders unnecessary our discussing the other elements of adverse possession. See Chaplin, 100 Wn.2d at 857 (elements must be met concurrently); Miller, 91 Wn. App. at 828 (party claiming adverse possession bears burden of proof on each element).

The court did not err in rejecting the Bitars' claim of adverse possession.

Mutual Recognition and *Acquiescence*

A plaintiff claiming ownership under the doctrine of mutual recognition and acquiescence must prove each of the following elements by clear, cogent, and convincing evidence: (1) a line certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etcetera; (2) in the absence of an express agreement establishing the designated line as the boundary line that the adjoining landowners or their predecessors in interest manifested in good faith by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line, and not mere acquiescence in the existence of a fence as a barrier; and (3) the requisite mutual recognition and acquiescence in the line continued for 10 years.[18] Evidence is clear, cogent, and convincing "when the ultimate fact in issue is shown by the evidence to be highly probable"[19]

The court found there is no record showing precisely where the Adams fence used to be and that when they existed together, the two fences were separate and roughly parallel. Bitars argue the court erred in failing to find that the two fences were located within inches of each other.

Mr. Bitar testified the two fences were "within inches, but as you go toward the

[18] Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565 (1967); Lilly v. Lynch, 88 Wn. App. 306, 316–17, 945 P.2d 727 (1997).

[19] In re Dep. of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995) (internal quotation marks omitted).

railroad tie, there would have been some divergence."[20] His later testimony was less clear. But Mr. Haggerty stated there never were two fences close together in the disputed area. This is consistent with Mrs. Adams' testimony. The court did not err in refusing to make the requested finding.

The court also found that, like the previous underground fence, the second one was intended to contain a new dog, not to mark a boundary line. This too is supported by substantial evidence.

Bitars' claim of title by mutual acquiescence and recognition thus fails at the threshold because there was no well-defined line. The Adams fence and the Haggerty fence were separate fences built roughly along parallel lines. They coexisted in the disputed area for a couple of years until the Adams fence was dismantled in May 1999. Even assuming the Haggerty fence then became a well-defined line, the line did not exist as such for the required 10 years.

Further, there is no evidence that the Haggerty fence was recognized and accepted as the true boundary line. Mr. Haggerty repeatedly testified the fence was built merely to enclose cattle, just as the first fence was built to enclose horses. The Haggertys did not do a survey and did not attempt or intend to use the fence as a boundary line. To them, the fence was "a practical division."[21] The Adamses also testified that their fence was a matter of convenience and they knew it did not mark the property line. That the Bitars considered first the Adams fence, then the Haggarty

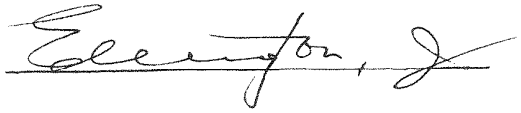
[20] RP (Jan. 13, 2009) at 121.

[21] Clerk's Papers at 120.

fence as marking the boundary is insufficient. The law requires mutual recognition and acquiescence, which the evidence does not establish.

The court did not err in rejecting the Bitars' claim of mutual recognition and acquiescence.

Affirmed.



WE CONCUR: